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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al.,

Case No. 5:20-cv-08570-LHK (VKD)

18 Plaintiffs.

Hon. Virginia K. DiMarchi

19 | vs.

20 | FACEBOOK INC

**PLAINTIFFS' OPENING BRIEF
REGARDING FACEBOOK, INC.'S
AUGUST 20, 2021 CLAWBACK NOTICE**

21 || Defendant

22 This Document Relates To All Actions

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FILED UNDER SEAL**INTRODUCTION**

Facebook has clawed back nine communications from an April 8-9, 2018 email thread, asserting attorney-client privilege. These communications do not appear, based on their unredacted context, to be attorney-client privileged. First, they do not appear to have been primarily made for the purpose of providing legal advice. Second, they do not appear to have been made confidentially between attorney and client, as a third-party public relations consultant was a recipient of each challenged communication. Finally, Facebook has, despite repeated inquiries, declined to offer specific facts to support its claim of non-waiver over the subject communications—each of which was previously produced in unredacted form outside this litigation, perhaps on several occasions.

Facebook, which bears the burden of proving each aspect of the claimed privilege, has not carried its burden here with respect to any of the communications it seeks to withhold from Plaintiffs. Facebook should be compelled to produce each clawed-back communication in unredacted form.

BACKGROUND

On August 20, 2021, Facebook sent Plaintiffs a letter (Ex. A) and supplemental privilege log (Ex. B) seeking to claw back twelve documents. The twelve documents Facebook clawed back—all from a single email thread—include nine distinct communications that Facebook has now redacted on the basis of alleged attorney-client privilege. In the three representative documents submitted with this motion as Exhibits C-E, these redactions are labeled by Plaintiffs with “R1” to “R9” in order to ease the Court’s understanding and review. Plaintiffs have not seen the actual underlying communications that Facebook has now redacted but have requested that Facebook produce Exhibits C-E, which comprise all nine challenged redactions, to the Court in unredacted form for *in camera* review.

24 [REDACTED]
25 [REDACTED]
26 [REDACTED] . See Exs. C-
27 E. [REDACTED]
28 [REDACTED]

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1

[REDACTED]

2

[REDACTED]

3

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[REDACTED]

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Ex. C at PALM-002033287-88; *see also* Ex. D at PALM-002033781; Ex. E at PALM-002033754.

15

[REDACTED]

16

17

18

19

[REDACTED] Ex. C at PALM-002033287; *see* Ex.

20

F. [REDACTED]

21

[REDACTED] Ex.

22

C at PALM-002033287. [REDACTED]

23

24

25

26

27

[REDACTED] *Id.* at PALM-002033286-87.

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] *See Ex. C at PALM-002033286.* [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] . *See Ex. C at PALM-002033283-85 (redactions R2-R5).* [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] *See id.* [REDACTED]
13 [REDACTED]
14 [REDACTED] Ex. C at
15 PALM-002033283. None of these emails appear to request or provide legal advice.
16 [REDACTED]
17 [REDACTED] . *See Ex. C at PALM-002033282.* [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] Ex. C at PALM-002033282 (emphasis
21 added). [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] *Id.* [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 [REDACTED]

2 [REDACTED]

3 [REDACTED] See Ex. C at PALM-002033281-88.

4 [REDACTED]

5 [REDACTED] See Ex. C at PALM-002033280-81. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] See, e.g., Ex. C at PALM-002033280 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] *id.* at PALM-002033279 [REDACTED]

12 [REDACTED]

13 [REDACTED] Ex. D at PALM-002033773 [REDACTED]

14 [REDACTED]. It is unclear what is redacted in R7-R8 (in Ex. C) and R9 (in Ex. D), but all information available to Plaintiffs indicates that public relations support for Facebook as a business was the primary, and likely sole, purpose for these communications that Facebook now claims are attorney-client privileged. See Ex. C at 2033279-80 (R7 and R8); Ex. D. at PALM-002033773 (R9).

15 On September 10, 2021, Plaintiffs wrote a letter to Facebook challenging its clawback of the

16 redacted communications in Exs. C-E, including on the basis of waiver. See Ex. G. Facebook

17 responded that the “documents were produced to the FTC inadvertently” and that Facebook had

18 “also clawed back the documents from the FTC.” See Ex H. On October 6, 2021, the parties met and conferred, and on October 14, they submitted a joint discovery letter brief. See Ex. I. On October 26, the Court ordered briefing on the parties’ privilege dispute regarding Facebook’s August 20, 2021 clawback. On November 4, 2021, in response to an email from Plaintiffs, Facebook made representations regarding its contention that Rebecca Hahn of The OutCast Agency—a recipient of each clawed-back communication—[REDACTED]

27 [REDACTED]

28 [REDACTED] See Ex. J.

FILED UNDER SEAL**ARGUMENT**

Facebook asserts that nine redacted communications contained in twelve clawed-back documents are attorney-client privileged.¹ “The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (cleaned up). Under Ninth Circuit law, “an eight-part test determines whether information is covered by the attorney-client privilege:”

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.”

United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (cleaned up); *see also Sanmina Corp.*, 968 F.3d at 1116 (reciting same test). “The party asserting the privilege bears the burden of proving each essential element.” *Ruehle*, 583 F.3d at 607. Because the attorney-client privilege “contravenes the fundamental principle that the public has a right to every man’s evidence, courts construe it narrowly to serve its purposes[.]” *Wadler v. Bio-Rad Lab’ys, Inc.*, 212 F. Supp. 3d 829, 850 (N.D. Cal. 2016) (cleaned up). Here, Facebook has not—as it is required to do—satisfied at least three essential elements necessary to establish that these clawed-back communications are privileged.

First, Facebook has not shown—and cannot show—that the communications it now claims are attorney-client privileged were made “for the purpose of giving legal advice.” Based on the unredacted portions of the clawed-back documents and the recipients of the allegedly privileged communications, it is apparent that the clawed-back communications pertained to a public relations fiasco. What is *not* apparent—nor even, as far as Plaintiffs can tell, possible—is that the email threads in question primarily involve confidential requests for, and ultimately the confidential provision of, *legal advice* by Facebook attorneys to their corporate client. Under Ninth Circuit law, this means the communications in question, even though they involve Facebook attorneys, are *not*

¹ Facebook has not asserted work product protection or any other privilege over the twelve clawed-back documents.

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1 attorney-client privileged. *See In re Grand Jury*, 13 F.4th 710, 713-14 (9th Cir. 2021) (adopting
2 “primary purpose” test to evaluate claims of privilege where attorney-client communications “might
3 have more than one purpose”).

4 Second, Facebook has not shown that the communications it now claims are attorney-client
5 privileged were in fact made solely and confidentially between attorney and client. “[A] party
6 asserting the attorney-client privilege has the burden of establishing the relationship *and* the
7 privileged nature of the communication.” *Ruehle*, 583 F.3d at 607 (emphasis in original). But *every*
8 communication that Facebook now claims is attorney-client privileged was made to a third-party
9 public relations consultant, Rebecca Hahn of The OutCast Agency. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] *See* Ex. J at 1. But that does not help with the actual
13 privilege claim here. Either the redacted communications were primarily made for the purpose of
14 giving confidential *legal* advice (in which case Ms. Hahn was a third party, as Facebook makes no
15 claim she was functionally part of its legal team), or the redacted communications were made (as
16 seems evident from their unredacted context) principally for non-legal reasons—*i.e.*, [REDACTED]

17 [REDACTED]
18 [REDACTED] but
19 accepting its claim on that point means that it loses on the privilege issue: Ms. Hahn’s presence on
20 every redacted communication lays bare the true nature of what Facebook seeks to claw back.

21 Third, Facebook has not established that its past production(s) of the communications it now
22 claims are privileged did not irrevocably waive privilege over these communications. As with every
23 other aspect of the Ninth Circuit test for attorney-client privilege, it is the privilege proponent’s
24 burden to establish non-waiver. Facebook has not done so here. It has claimed that its past
25 production(s) of the communications in question was or were “inadvertent,” but to this day,
26 Facebook has declined to tell Plaintiffs even *how many times* the clawed-back communications were
27 produced in unredacted form outside of this litigation—let alone when, to whom, and under what
28 circumstances. All Plaintiffs know at this point is that Facebook produced each challenged

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1 communication at least one other time, at least two years ago, and outside the context of *any* litigation
2 (let alone this one). And Facebook apparently never sought to claw the information back from
3 *anyone* until mid-2021. To meet its burden to establish non-waiver under Ninth Circuit law,
4 Facebook must explain to whom it previously produced the challenged communications; when; and
5 in what context. Facebook has failed to do so.

6 **I. Facebook Cannot Establish That The Redacted Communications Were Primarily**
7 **Made For The Purpose Of Giving Legal Advice**

8 Each of the nine clawed-back communications (R1-R9 in Plaintiffs' Exs. C-E) appears in
9 the midst of a lengthy email thread devoted principally—and as far as Plaintiffs can discern from its
10 public portions, entirely—to [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 [REDACTED] *See* Ex. C at PALM-002033287-
15 88. [REDACTED]

16 [REDACTED]
17 [REDACTED]. *Id.* at PALM-002033286-87. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED]
22 [REDACTED]. *See id.* at PALM-002033279-88;
23 Ex. D at PALM-002033773.

24 On April 11, 2018—forty minutes after TechCrunch published a story titled “Zuckerberg
25 claims competition from ‘8 social apps’, but Facebook owns 3,” Ex. K, [REDACTED]

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 [REDACTED] Ex. L at PALM-002033644-45).)² [REDACTED]

2 [REDACTED]

3 [REDACTED] *Id.* at PALM-002033644.

4 Given all the above the purpose of the entire email thread in Exs. C-E—and every
 5 communication therein—was plainly [REDACTED]

6 [REDACTED] This is not a legal issue, there do not appear (based on the information
 7 available to Plaintiffs) to be within Exs. C-E any requests for confidential legal advice—as opposed
 8 to business/communications inquiries to lawyers with historical or contextual knowledge about
 9 relevant issues. [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]³ “[REDACTED]

13 [REDACTED]⁴ [REDACTED]⁵ [REDACTED]

14 [REDACTED]⁶)

15 all indicate a non-legal purpose to the communications in Exs. A-C. *See, e.g., In re Vioxx Prod.*
 16 *Liab. Litig.*, 501 F. Supp. 2d 789, 809 (E.D. La. 2007) (“primary purpose” of communications
 17 “addressed to both lawyers and non-lawyers for review, comment, and approval” was “not to obtain
 18 legal assistance”); *United States v. Chevron Corp.*, 1996 WL 444597, at *2 (N.D. Cal. May 30,
 19 1996); *United States v. Int'l Bus. Machines Corp.*, 66 F.R.D. 206, 213 (S.D.N.Y. 1974). [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED], Ex. L at PALM-002033644, [REDACTED]

24

25 ² Plaintiffs do not challenge the non-overlapping redaction in Ex. K, as the Court has ruled such a
 26 challenge untimely.

27 ³ Ex. C at PALM-002033287 (emphasis added).

28 ⁴ *Id.* at PALM-002033286.

⁵ *Id.* (emphasis added).

⁶ *Id.* at PALM-002033281 (emphasis added).

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1 [REDACTED] *id.*—indicates that the actual thread, lawyer communications and all, was actually
2 about a [REDACTED], and not anything else. *See, e.g., Breuder v. Bd. of Trustees of Cnty. Coll. Dist.*
3 *No. 502, 2021 WL 4283464, at *7 (N.D. Ill. Sep. 21, 2021)* (noting that “general public relations
4 work . . . falls outside the scope of the narrowly construed attorney-client privilege” and rejecting
5 privilege claim where party did not establish that public relations consultants were ““necessary’ to
6 enable counsel to provide legal advice”).

7 Given that every redacted communication appears in an email thread solely directed toward
8 a [REDACTED], and not toward any sort of legal proceeding, question, or investigation, it is possible
9 (even likely) that there is no legal purpose *at all* to one or more of the clawed-back communications.
10 The mere inclusion of in-house counsel on these documents does not transform their non-legal
11 nature. *See Meade v. Gen. Motors, LLC*, 250 F. Supp. 3d 1387, 1393 (N.D. Ga. 2017) (“The number
12 of lawyers or non-lawyers to whom a communication was disseminated is not dispositive and a
13 corporation’s choices of means and format in the communications between their lawyers and
14 employees cannot limit their adversaries’ right of discovery of what otherwise is non-privileged and
15 discoverable.” (cleaned up)); *IP Co., LLC v. Cellnet Tech., Inc.*, 2008 WL 3876481, at *3 (N.D. Cal.
16 Aug. 18, 2008). Nor does Facebook’s casual use of [REDACTED] Ex. C at PALM-002033282, as
17 confirmed by Facebook’s choice *not* to redact information under this moniker in the very documents
18 at issue. *See, e.g., SPS Techs., LLC v. Briles Aerospace, Inc.*, 2020 WL 3050777, at *5 n.7 (C.D.
19 Cal. Feb. 18, 2020) (“[I]nformation does not become privileged merely by marking it as such.”);
20 *United States ex rel. Baklid-Kunz. v. Halifax Hosp. Med. Ctr.*, 2012 WL 5415108, at *6 (M.D. Fla.
21 Nov. 6, 2012). And even for those documents that reflect communications *from* Facebook’s in-
22 house counsel, “[i]t is not enough that a document was created by attorneys if the information that
23 it contains was not made for the purpose of facilitating the rendition of legal advice or services,”
24 *i.e.*, “the sort of advice that can be rendered *only* by consulting the legal authorities.” *In re Domestic*
25 *Airline Travel Antitrust Litig.*, 2020 WL 3496748, at *6 (D.D.C. Feb. 25, 2020) (emphasis added).

26 Facebook certainly has not met its burden to establish such a purpose from the privilege log
27 it provided (Ex. B), nor from the overall context of the clawed-back documents (Exs. C-E)—and
28 under Ninth Circuit law, it is Facebook’s burden to establish that both “the [attorney-client]

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1 relationship *and* the privileged nature of the communication.” *Ruehle*, 583 F.3d at 607 (emphasis in
 2 original). Moreover, to the extent Facebook is able to establish *any* connection to an ostensible legal
 3 purpose in the redacted communications, the Ninth Circuit demands more: “where an attorney’s
 4 advice may integrally involve both legal and non-legal analysis,” the Ninth Circuit applies the
 5 “primary purpose test,” in which “courts look at whether the *primary purpose* of the communication
 6 is to give or receive legal advice as opposed to business or tax advice.” *In re Grand Jury*, 13 F.4th
 7 at 713-14. Given the unambiguously non-legal context of the entire thread—from start [REDACTED]
 8 [REDACTED] to finish [REDACTED]

9 [REDACTED]—Facebook has failed to show that the redacted comments by attorneys throughout were
 10 “primarily” made for the purpose of giving legal advice, as required under Ninth Circuit law.⁷

11 **II. Each Challenged Communication Was Made To A Third Party Who Was Not A**
 12 **Functional Employee With Respect To The Claimed Privilege**

13 Next, even if one or more of the redacted communications was made primarily for the
 14 purpose of providing legal advice (which seems unlikely based on the information available to
 15 Plaintiffs), there is a separate problem with Facebook’s claims of attorney-client privilege over the
 16 redacted communications in Exs. C-E: each clawed-back communication was made to a third-party
 17 press consultant, Rebecca Hahn of The OutCast Agency. See Ex. C at R1-R8; Ex. D at R9.

18 “The transmission of a communication to a party outside the attorney-client relationship
 19 destroys the confidentiality of the communication and therefore the privilege may not be invoked
 20 as to that communication.” *Schaeffer v. Gregory Village Partners*, 78 F. Supp. 3d 1198, 1202 (N.D.
 21 Cal. 2015). Here, each clawed-back communication was sent to Ms. Hahn—a person who was not
 22 a Facebook employee in April 2018 (or ever). In order to claim attorney-client privilege over the
 23

24 ⁷ The outcome does not change regardless of whether this Court inquires if “*the* primary purpose”
 25 or “*a* primary purpose” of each redacted communication was to provide confidential legal advice.
 26 See *In re Grand Jury*, 13 F.4th at 716-17 (declining to choose between “*the* primary purpose” or “*a*
 27 primary purpose” because “the universe of documents in which the [‘*a* primary purpose’] test would
 28 make a difference is limited . . . [and] would only change the outcome of a privilege analysis in truly
 close cases, like where the legal purpose is just as significant as a non-legal purpose”); cf. *Ruehle*,
 583 F.3d at 607 (“The fact that a person is a lawyer does not make all communications with that
 person privileged. Because it impedes full and free discovery of the truth, the attorney-client
 privilege is strictly construed.” (cleaned up)).

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1 communications in question—and wholly aside from its burden to establish these communications' 2 legal purpose—Facebook bears the burden of showing that they were sent only “to the client,” *i.e.*, 3 Facebook. *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). [REDACTED]
4 [REDACTED],
5 Facebook must establish that Ms. Hahn was a “functional employee” of Facebook vis-à-vis the
6 communications in question to claim privilege. *See id.* at 1156-59.

7 On this issue, Plaintiffs have seen no actual evidence from Facebook, but did receive last
8 Thursday, November 4, 2021, a list of assertions that Facebook believes establish that [REDACTED]

9 [REDACTED]
10 • [REDACTED]
11 • [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 • [REDACTED]
15 • [REDACTED]
16 • [REDACTED]
17 o [REDACTED]
18 o [REDACTED]
19 o [REDACTED]
20 o [REDACTED]
21 • [REDACTED]
22 • [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Ex. J at 1.

26 Facebook provided Plaintiffs no actual evidence in support of the above allegations, so
27 Plaintiffs are unable to do much but take them at face value at this point—although under Ninth
28 Circuit law, the Court must actually evaluate Facebook’s *proof* of its assertions about Ms. Hahn.

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1 See *Graf*, 610 F.3d at 1157-59 (reviewing evidence and findings of fact relating to functional
2 employee determination); *Schaeffer*, 78 F. Supp. 3d at 1200-02, 1203-05 (evaluating evidence
3 relating to functional employee determination). On this score, Plaintiffs note that Ms. Hahn’s own
4 public statements about her work in the years immediately preceding 2018 indicate that she worked
5 out of (and indeed founded) The OutCast Agency’s Los Angeles office, and “worked with brands
6 across diverse industries including: Andreessen Horowitz, Facebook, Fifth Wall Ventures, Intuit
7 TurboTax, Instagram, Lyft, Mint.com, the NFL, Oculus, and Tanium.” Ex. M at 1.

8 Based on Facebook’s assertions about Ms. Hahn, and Ms. Hahn’s own statements about her
9 work while at The OutCast Agency, Ms. Hahn does not closely resemble the consultants found to
10 be “functional employees” for privilege purposes in *Graf* and in *Schaeffer*. For example, in *Graf*,
11 “[e]vidence at trial . . . showed Graf was heavily involved in all facets of the corporation’s
12 operations.” 610 F.3d at 1153. Although ostensibly a “consultant,” there was evidence that the only
13 reason Graf was not hired formally as a company employee was that the state of California had
14 banned him from insurance work, which was the company’s business. *Id.*; see also *Schaeffer*, 78 F.
15 Supp. 3d at 1203 (discussing *Graf*). This stands in contrast to Ms. Hahn, who was apparently a
16 consultant in the truest sense of the word—working at (and out of) a third-party public relations
17 agency on behalf of nearly a dozen major accounts, of which Facebook was one. See Ex. M at 1;
18 *Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80, 90 (S.D.N.Y. 2019) (“functional equivalent
19 exception” inapplicable where third party lacked “independent decision-making authority, primary
20 responsibility, and . . . had numerous other customers” (emphasis added and cleaned up)); *In re
21 Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 352 F. Supp. 3d 207, 215 (E.D.N.Y.
22 2019) (consultants not “functional employees” where they “likely served as consultants for other
23 companies”); *Lynx Sys. Devs., Inc. v. Zebra Enter. Sols. Corp.*, 2018 WL 1532614, at *4 (D. Mass.
24 Mar. 28, 2018) (consultants not functional employees where “not obligated to work exclusively for
25 Zebra”); *Durling v. Papa John’s Int’l, Inc.*, 2018 WL 557915, at *5 (S.D.N.Y. Jan. 24, 2018).

26 In *Schaeffer*—and in several cases analyzed by the Court in that decision—the consultants
27 found to be functional employees with respect to allegedly privileged communications had specific
28 legal bents to their responsibilities at the corporations in question. For example, in *In re Bieter Co.*,

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1 16 F.3d 929 (8th Cir. 1994), “the consultant was intimately involved in the subject matter of
 2 litigation,” *Schaeffer*, 78 F. Supp. 3d at 1203; in *In re Copper Market Antitrust Litigation*, 200 F.R.D.
 3 213 (S.D.N.Y. 2001), “the court found that the privilege extended to litigation-related
 4 communications to and from a public relations firm a corporation hired to respond to actual and
 5 anticipated litigation” *Schaeffer*, 78 F. Supp. 3d at 1203; and in *Schaeffer* itself, the consultant in
 6 question was hired amidst potential litigation and “acted as the public face of the company and
 7 provided information to [the company’s] legal staff that was useful and necessary to evaluate legal
 8 strategy for the company going forward,” *id.* at 1204. As a result, the consultant “acted as [the
 9 company’s] functional employee *for the purpose of the attorney-client privilege.*” *Id.*

10 On this last score, Ms. Hahn’s responsibilities and role stand in contrast to the cases cited
 11 and applied in *Schaeffer*, and to *Schaeffer* itself. [REDACTED]

12 [REDACTED] See Ex.
 13 J. [REDACTED] regarding Ms. Hahn’s role in Facebook’s
 14 legal strategy, or on Facebook’s legal team. *See id.* [REDACTED]
 15 [REDACTED], which explains her
 16 presence throughout the decidedly non-legal communications in Exs. C-E. This is similar to the
 17 *Calvin Klein* case discussed in *Schaeffer* (*see Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D.
 18 53 (S.D.N.Y. 2000)), in which “the communications at issue appeared on their face to be routine
 19 suggestions from a public relations firm as to how to put the ‘spin’ most favorable to Calvin Klein
 20 on successive developments in the ongoing litigation.” *Schaeffer*, 78 F. Supp. 3d at 1204 (cleaned
 21 up). “The [*Calvin Klein*] court found that few, if any of the documents in issue appear to contain or
 22 reveal confidential communications from the underlying client made for the purpose of obtaining
 23 legal advice.” *Id.* (cleaned up).

24 So too here: even taking Facebook at its word, there is *no* evidence that Ms. Hahn was
 25 functionally part of Facebook’s *legal* team, and thereby could be privy to confidential attorney-
 26 client communications for a *legal* purpose—and this makes perfect sense given the overall context
 27 of the challenged communications as non-legal in nature. *See, e.g., Planned Parenthood Fed’n of*
 28 *Am., Inc. v. Ctr. For Med. Progress*, 2019 WL 1950381, at *6 (N.D. Cal. May 1, 2019) (“the

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1 dispositive question [for the functional employee inquiry] is the consultant's relationship to the
 2 company and whether by virtue of that relationship she possesses information about the company
 3 that would assist the company's attorneys in *rendering legal advice*" (emphasis added and cleaned
 4 up)); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 964 (N.D. Ill. 2009) (not
 5 "functional equivalent" of employees where consultants' work not "necessary to assist counsel in
 6 rendering legal advice"). [REDACTED]

7 [REDACTED]. Ms. Hahn's—a non-member of
 8 the legal team, functional or otherwise—[REDACTED]

9 [REDACTED] simply underscores that Exs. C-D do not contain any confidential attorney-client
 10 communications made primarily for the purpose of legal advice.

11 **III. Facebook Previously Produced The Challenged Communications, And Has**
 12 **Offered No Facts To Establish Its Past Production Was Inadvertent**

13 Each of the challenged communications was previously produced in unredacted form at least
 14 once, outside the context of this litigation. For example, Facebook admittedly produced each of the
 15 challenged communications to the Federal Trade Commission in 2019 as part of a civil investigation.
 16 Ordinarily, such a disclosure would waive privilege over the produced information. *See In re Pacific*
 17 *Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012); *see also Church & Dwight Co. v. Mayer Lab'ys,*
 18 *Inc.*, 2011 WL 6119146, at *1 (N.D. Cal. Dec. 8, 2011) (prior production to FTC waived privilege
 19 in subsequent private antitrust litigation); *United States v. Paulus*, 2021 WL 4494607, at *7 (E.D.
 20 Ky. Sep. 30, 2021) (determining that production of documents to government in prior investigation
 21 "resulted in waiver of both attorney-client and work product privileges" in subsequent litigation,
 22 and Rule 502(d) clawback order entered in subsequent litigation did not "retroactively limit the
 23 effect of [producing party's] disclosure" of documents in prior investigation because 502(d) order
 24 "cannot govern an entirely separate disclosure that occurred in a different proceeding.").

25 It is Facebook's burden under Ninth Circuit law to *establish* (not just assert) non-waiver.
 26 *See, e.g., Ruehle*, 583 F.3d at 607-08 ("unless the protection be waived" is one of the eight essential
 27 elements of attorney-client privilege, and "[t]he party asserting the privilege bears the burden of
 28 proving each essential element" (emphasis added)). However, despite months of requests by

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1 Plaintiffs, Facebook has declined to offer *any* specific facts regarding its past production(s) of the
2 challenged communications. *See* Ex. J at 1-7; Ex. N; Ex. O. Facebook has refused to even identify
3 to Plaintiffs (i) every entity Facebook previously produced these communications to; (ii) the dates
4 and other circumstances of those production(s); (iii) when and how a clawback communication was
5 made to those other entities; (iv) the circumstances of Facebook's review prior to previously
6 producing the communications in question; or (v) any specific facts at all to support Facebook's
7 claim that its previous production(s) of the information Facebook now claims privilege over was (or
8 were) "inadvertent." *See id.* This has made it impossible for Plaintiffs to actually rebut (or even
9 evaluate) Facebook's claim of inadvertent production in this brief—even though Plaintiffs
10 specifically asked for this information in order to draft this brief, most recently on November 2,
11 2021. *See* Ex. J at 3. And unless Facebook offers actual evidence on inadvertence—including at
12 minimum the basic facts outlined above—in its submission to the Court, it will have run afoul of its
13 evidentiary burden to establish non-waiver over the contested communications. *See Ruehle*, 583
14 F.3d at 607-08; *Viamedia, Inc. v. Comcast Corp.*, 2017 WL 2834535, at *3-*7 (N.D. Ill. Jun. 30,
15 2017) (analyzing evidentiary support for claim of inadvertence); *Coles Wexford Hotel, Inc. v.*
16 *UPMC and Highmark, Inc.*, 2016 WL 462856, at *1-*3 (W.D. Pa. Feb. 8, 2016) (same); Fed. R.
17 Evid. 502(b).

CONCLUSION

19 For the foregoing reasons, the redacted communications in Exs. C-E are not attorney-client
20 privileged, and Facebook should be compelled to produce each of the documents listed in Ex. B to
21 Plaintiffs in fully unredacted form.

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1 DATED: November 8, 2021

Respectfully submitted,

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1 **ATTESTATION OF BRIAN J. DUNNE**

2 This document is being filed through the Electronic Case Filing (ECF) system by attorney
3 Brian J. Dunne. By his signature, Mr. Dunne attests that he has obtained concurrence in the filing
4 of this document from each of the attorneys identified on the caption page and in the above signature
5 block.

6 Dated: November 8, 2021

7 By /s/ Brian J. Dunne

8 Brian J. Dunne

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on this 8th day of November 2021, I electronically transmitted the
11 foregoing document to the Clerk's Office using the CM/ECF System, causing the document to be
12 electronically served on all attorneys of record.

13 By /s/ Brian J. Dunne

14 Brian J. Dunne

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